IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.29 OF 2005

Maharashtra Conductor Association (SSI) ... Petitioner.

vs.

Maharashtra State Electricity Board. ... Respondent

Mr.D.D.Madan with D.H.Mehta i/b. N.M.Shah, for Petitioner.

Mr.P.P.Charan i/b. Little & Co., for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 27th September,2005

P.C.:-

1. By this petition, the petitioner challenges the award dated 30.4.2004 made by the sole Arbitrator. The petitioner's challenge to the Award is limited. The petitioner challenges the award made by the learned Arbitrator against point no.4, point no.8 and point no.11.

2. The admitted position is that the petitioner is an Association of various small scale industrial units. The respondent has admittedly purchased the goods manufactured by these small scale industrial units who were the

members of the petitioner-association. As the payment of price of the goods was not made in time, therefore, the claim of the petitioner association was for payment of interest in accordance with the provisions of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act,1993 (hereinafter referred to as the Act).

3. The respondent had entered into a contract with the 12 members of the petitioner association. The Eight members out of 12 members have admittedly completed their supply of goods under the tender. But the four members did not complete the supply. The respondent made payment of price to the members of the petitioner, but the payment of price was not made in time. In terms of the Act, the members of the petitioner-association are entitled to interest. The interest was not paid therefore, Writ Petition no.1347 of 2001 was filed in this court, seeking direction to the respondent to make payment in accordance with the Act. On 10.12.2002 in that Writ Petition, the consent terms were filed by the parties and the dispute was referred to the Arbitrator. The arbitrator has made the Award on 30.4.2004 which is under challenge in this petition in so far as the findings on point nos.4, 8 and 11 are concerned. The point no.8 reads as under:-

> "8. Whether four members of the Claimants, namely
>
> (i) Patrik Conductors Pvt. Ltd.

(ii) Galaxy Cables Industries,

(iii) Dattatraya Cable Pvt.Ltd.

(iv) Reliance Cables and Conductors Private Ltd.

are entitled to raise the claim for interest in respect of the Contract No.T-0901?"

Those four members of the petitioner could not complete the supply therefore, the contract for supply of the balance quantity was cancelled by mutual consent without any financial liability on either side. The case of the respondent was that because the four members had agreed to the cancellation of the contract for supply of balance quantity without any financial liability on either side, the four members are not entitled to payment of interest. According to the respondent, because the four members did not complete the supply, the respondent was entitled to claim damages from them, but that entitlement of the respondent is given up by the respondent because the four members had agreed not to claim any interest. The learned Arbitrator has upheld this contention and has held that four members had waived their entitlement to receive interest under the Act. The submission of the petitioner is that the finding recorded by the learned Arbitrator is contrary to the provisions of Section 4 of the Act. Section 4 of the Act reads as under:-

"4. Date from which and rate at which interest is payable - Where any buyer fails to make payment

> of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at one-and-a-half time of Prime Lending Rate charged by the State Bank of India."

Perusal of the provisions of the above quoted Section 4 of the Act shows that the section operates notwithstanding anything contained in any agreement between the parties. Therefore, even if it is assumed that an agreement was arrived at between four members of the petitioner and the respondent that in consideration of the respondent agreeing to cancel the contract for supply of balance quantity, the four members will waive their right to receive interest under section 4 of the Act, then also in view of the provisions of Section 4 of the Act which lays down that notwithstanding anything contained in any agreement, the buyer will be liable to pay interest to the supplier, the respondent would be liable to pay interest in terms of the provisions of Section 4 of the Act. The provisions of section 4 of the Act are clear that they do not permit contracting out by the supplier. The legislature has obviously made the provision because the small scale industries' suppliers and the buyers were not

in equal position and the contract was between unequal parties. Therefore, it may possible that small scale industries may enter into a contract of waiving the interest on delayed payments, to which they are entitled to under the provisions of the Act. The intention of the legislature in including the non obstanti clause in section 4 of the Act appears to be to disregard any contract contrary to the provisions of Section 4 of the Act entered into by the parties. In my opinion, the finding recorded by the learned Arbitrator against point no.8 is contrary to the provisions of Section 4 of the Act, and therefore, the finding is liable to be set aside. It is accordingly set aside.

4. The petitioner also challenges the finding recorded by the learned Arbitrator against point no.4. The point no.4 reads as under:-

> "4. Whether the claimants establish the claim for payment of interest in accordance with the provisions of the Act, if so, the quantum?"

According to the provisions of the Act, a supplier becomes entitled to receive price of the goods supplied by him at the rate agreed between the parties. If the payment is not made in accordance with the provisions of the Act, of the price of the goods supplied, then the supplier becomes entitled to interest at 1.1/2 time of Prime Lending Rate charged by the State Bank of India. The case of the petitioner was that the members were entitled to receive interest in accordance with Section 4 of the Act from the date of their entitlement to receive the

amount till the date of actual payment and at the rate of interest which is mentioned in Section 4 of the Act. According to the respondent, the members of the petitioner are not entitled to receive interest at 1.1/2 time the prime lending rate after 26.4.2001 till the date of actual payment of the price was made. A reason that was given by the respondent was that though there was arbitration clause in the agreement between the respondent and the members of the petitioner association, the petitioner association had filed in this Court a writ petition under Article 226 of the Constitution of India, seeking direction to respondent to make payment of interest in accordance with the provisions of the Act. That petition was filed on 27.4.2001 and was disposed of in December,2002. According to the respondent, from the date of filing of the petition, the members of the petitioner association are not entitled to rate of interest mentioned under Section 4 of the Act, but they are entitled to lesser rate of interest. The learned Arbitrator has accepted that contention and has awarded the interest at 1.1/2 time of Prime Lending Rate charged by State Bank of India from the due date till 26.4.2001 and at 10% per annum from 26.4.2001 till the date of actual payment. The reason that has been given by the learned Arbitrator is that the petitioner association was not justified in filing the writ petition under Article 226 of the Constitution of India before the High Court when there was an Arbitration clause agreed between the parties. It is an admitted position that in that writ petition there was no interim order made preventing payment of interest during the pendency of the writ petition. In other words, the respondent was free to make payment of interest which he has been

found liable to pay, even while the writ petition was pending. It is obvious from the Award that the learned Arbitrator has penalised the petitioner association by holding it entitled for lesser rate of interest because the writ petition under Article 226 of the Constitution of India was filed. The petition under Article 226 of the Constitution of India was filed probably, though there was an arbitration clause between the parties, because the respondent is the instrumentality of the State. What is interesting to note here is that if according to the respondent, the petitioner association was not totally justified in filing the writ petition, the respondent could have got that petition dismissed, instead the respondent entered into consent terms in that petition referring the matter to the Arbitrator. In my opinion, the circumstance of filing writ petition in the Court has no nexus with the rate of interest which is to be paid. The learned Arbitrator thus has awarded lesser rate of interest for totally irrelevant consideration. The Award of the learned Arbitrator awarding the interest at the rate of 10% from 26.4.2001 against point no.4 is liable to be set aside. It is accordingly, set aside.

5. The petitioner also challenges the Award made against point no.11. The point no.11 reads as under:-

> "11. Whether the claimant is entitled to interest lite and future interest on the amount found due and if so at what rate?"

The learned Arbitrator has directed payment of interest at the rate of 10% from the date of Award till the date of realisation in the following manner.:-

> "17. POINT NO.11:-
>
> The Claimants are entitled to interest on the amounts found due at the rate of 10% per annum from the date of the Award till the date of realization. The pendente lite interest as mentioned hereinabove is also awarded at the rate of 10% per annum."

Perusal of the above quoted Award shows that the learned Arbitrator has not given any reason as to why interest at the rate of 10% per annum is awarded . The learned Counsel appearing for the respondent submitted that probably because it is the period after the date 26.4.2001, because of finding recorded against point no.4, the interest at the rate of 10% was directed to be paid. If that is the reason, for awarding interest at the rate of 10% per annum, then because I have held that even for the period subsequent to 26.4.2001 the members of the petitioner association would be entitled to interest at the rate mentioned in Section 4 of the Act, the petitioner would be entitled to interest at the same rate on the awarded amount till the date of realisation. However, fixing the rate of interest for the period subsequent to the Award is in the discretion of the Arbitrator and therefore, it was open to the learned Arbitrator to give valid reason to award interest at a lesser or higher rate than mentioned in Section 4 of the Act. But in the Award the learned Arbitrator, without disclosing any reason, has fixed the rate of interest at 10% per annum. The fixation of rate of interest

at 10% per annum without disclosing any reason in the aforesaid circumstances, is totally unjustified and therefore, the Award in this regard is liable to be set aside. Section 31(7) (b) of the Arbitration & Conciliation Act,1996 lays down that if no interest is awarded by the Arbitrator then for the period from the date of the award till the date of payment, interest at the rate of 18% per annum can be recovered. Therefore, it is for the petitioner to decide what course of action they want to adopt.

6. In the reply that is filed in the petition, an objection has been raised on behalf of the respondent that the present petition can not be entertained by the Court because the respondent has filed Arbitration petition no.328 of 2004 and that petition has been dismissed by this court. According to the respondent, thereafter, the respondent has made payment of awarded amount to the petitioner. Therefore, in consequence thereof, according to the respondent, the award stands satisfied. I may make it clear that it is not the objection raised by the petitioner that because the petitioner has accepted the awarded amount without any demur or objection, the present petition is not maintainable. The objection is that because the Arbitration petition filed by the respondent has been dismissed and because the respondent has made payment of the awarded amount, the award is satisfied. In my opinion, the submission is misconceived because the dismissal of the petition filed by the respondent against the Award does not make the petition filed by the petitioner challenging the same Award, not maintainable, and during the pendency of the petition if

any payment is received by the petitioner, it would be subject to result of the petition. In my opinion, therefore, it cannot be said that the Award is satisfied and therefore, the petition is not maintainable. In the result therefore, the present petition succeeds and is allowed. The findings recorded and the Award made by the learned Arbitrator in the impugned Award against point no.8 is set aside. The Award made by the learned Arbitrator in so far as interest at the rate of 10% per annum for the period subsequent to 26.4.2001, is set aside. Similarly, the Award made against point no.11 by the learned Arbitrator is set aside. The respondent is directed to pay cost of this petition to the petitioner as incurred by the petitioner.